



File

OFFICE OF THE CITY ATTORNEY
CITY OF SUNNYVALE

September 15, 2003

TO: Vice-Mayor Risch
FROM: City Attorney
SUBJECT: Downtown Incident and Subsequent Investigation

Background

On the night of August 31-September 1, 2003, DPS responded to what was described as a "melee" at the Forum nightclub on Murphy Street. Subsequently, the Vice-Mayor asked the City Manager to respond to a number of questions involving DPS conduct at the incident in question. The City Manager directed these questions to DPS Director Bakin who, in turn, asked Captain Glen Fortin to prepare a report. Captain Fortin has questioned, or at least tried to question, some of the officers involved. The PSOA has objected on the grounds that this activity constitutes an "investigation" into officer performance which is being conducted in violation of the Public Safety Officers Procedural Bill of Rights Act.

Issues Raised

1. Whether the process of providing answers to questions concerning the incident related to the general performance of the Department of Public Safety on that night directed through the City Manager to the Director of Public Safety, constitutes an 'investigation' as it relates to peace officer performance and the provisions of the Public Safety Officers Procedural Bill of Rights.
2. Whether the process of interviewing officers by their superiors in an attempt to ascertain facts related to the general performance of the Public Safety Department violates the provisions of the Public Safety Officers Procedural Bill of Rights.
3. Whether it is improper for the City Manager, acting at the request of a member of the City Council for information, to be involved in the process of providing answers to the questions raised.

Answers

1. A portion of the process of providing answers to the questions concerning the incident may be an 'investigation' of peace officer performance and the provisions of the Public Safety Officers Procedural Bill of Rights. The portion of concern is that related to officer interviews (see Answer #2).

2. The portion of the process involving officer interviews must comply with the Public Safety Officers Procedural Bill of Rights if the officers are interviewed about conduct that might lead to discipline.

3. There is no legal reason why the City Manager cannot be involved in responding to questions raised by members of Council, or the public at large.

Discussion

The Public Safety Officers Procedural Bill of Rights Act (PSOPBR) (Gov. Code §§3300 et. seq.), enacted in 1976, "is concerned primarily with affording individual police officers certain procedural rights during the course of proceedings which might lead to the imposition of penalties against them." (*White v. County of Sacramento* (1982) 31 Cal.3d 676, 681.) These rights include things like the right to representation, the right to be informed of the nature of the investigation, etc.

Under Gov. Code §3303, the rights guaranteed come into play when an officer is questioned about a subject that might lead to him or her being disciplined. Specifically, the statute provides:

Whenever any public safety officer is under investigation and subjected to interrogation by his or her commanding officer, or any other member of the employing public safety department, that could lead to punitive action, the interrogation shall be conducted under the following conditions. For the purpose of this chapter, punitive action means any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment.

Employers are given some leeway by way of subsection (i), which provides:

This section shall not apply to any interrogation of a public safety officer in the normal course of duty, counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor or any other public safety officer, nor shall this section apply to an investigation concerned solely and directly with alleged criminal activities.

The case of *City of Los Angeles v. Superior Court* (1997) 57 Cal.App.4th 1506, discusses the meaning of "investigation" under §3303. In that case, a police lieutenant heard from a citizen at the scene of a fatal car accident that a patrol car had previously driven past the scene, but the officer had gone into a nearby doughnut shop without stopping to render aid. The lieutenant determined the identity of the officer by checking the department deployment log and questioning employees of the doughnut shop. Later that day, the lieutenant questioned the officer about his whereabouts and activities. The lieutenant also learned that the officer did not have authorization to use a patrol car on the evening in question

but that that he had been out looking for a lost ticket book. The officer was ultimately terminated as a result of the incident.

In the course of subsequent administrative proceedings, the trial court held that the officer's statements to the lieutenant could not be used as evidence against him because the interrogation violated the PSOPBR. The appellate court agreed, rejecting the department's argument that the lieutenant's actions were "routine or unplanned contact" under §3303(i). The court pointed out that the lieutenant knew, before he questioned the officer, that the conduct alleged (failure to stop at the scene of an accident) violated department policy and could subject the officer to discipline. Therefore, the lieutenant should not have questioned the officer about the incident without complying with the PSOPBR.

The court also noted that subdivision (i) was included in the statute "to avoid claims that almost any communication is elevated to an 'investigation.'" The court acknowledged that "[t]here probably are cases in which routine questions and remarks begin to shade into an investigation to which subdivision (i) does not apply." However, "We need not decide just where that point is reached because *it is clear that under our test an investigation was underway in this case.*" (57 Cal.App.4th at 1514 [emphasis added].)

Vice-Mayor Risch's Letter

In his letter to the City Manager, the Vice-Mayor stated:

I would like clarification and further information on the following points:

1. The report indicates multiple 911 calls were received. Exactly how many 911 calls were received? When were these calls received? What was the nature of the calls?
2. The report indicates the 911 calls reported a "melee," however, when "officers arrived most of the combatants fled." How many officers responded to this call? What exactly did officers observe? How many people were detained, cited, or arrested and what were the ages of the subjects? Where did this alleged "melee" occur? How was a connection made between this event and the business being conducted by the Forum nightclub?
3. Why was it necessary to close Murphy Street? According to witnesses that I talked to, the only reason Murphy was "clogged" was due to Public Safety vehicles.
4. According to the report I received from you orally on the morning September 1, 2003 you indicated that officers only requested, as one option, that the Forum close early. However, all levels of the Forum management are consistent with the statement that Public Safety Officers ordered, not requested, the Forum closed 30 minutes early (no option). I request that you reconcile this discrepancy.
5. Why was the Forum the only establishment asked or required to close early on Murphy Street when there were large crowds in other businesses and nightclubs?

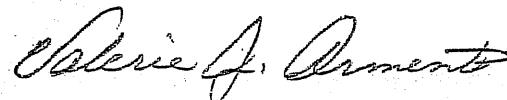
6. What was the rationale for letting 400 juveniles out onto the street 30 minutes early when as the report indicates, problems occurred presumably outside on Murphy Street and not in the Forum? Would this not have exacerbated any problems on the street rather than helping to solve them?
7. What was it necessary to deploy 9 squad cars, 2 paddy wagons, and 1 canine unit to control the crowd at the Forum? Why was it necessary for officers to have displayed pepper ball guns to the young crowd of 14 to 17 year olds as they were leaving the Forum? Was this the best use of Public Safety resources in our City given that it was a holiday weekend night and clearly these officers could have been out patrolling the streets during this time?
8. Why does the report indicate that this was a "potentially volatile situation?" What factors specifically related to the operation of the Forum nightclub suggest that the situation was "potentially volatile"?
9. Management of the Forum nightclub received many comments regarding the increased police presence, however most if not all could not be characterized as being "grateful" for the enhanced police activity. Most reported being confused and unclear as to why such a deployment was needed. Also, I understand many of the surrounding bar owners reported that their patrons were afraid to leave their businesses during this time. Exactly what particular information and how many comments from people led to the conclusion that the "Parents, bar patrons, and bar owners were grateful" for the enhanced police presence?

Finally, I request that I be allowed to listen to recordings of the dispatch operations from the time of 11:00 pm on Sunday August 31 to 12:30 am on Monday September 1 to more fully understand this situation.

The PSOPBR only applies to the questioning of officers who might be subject to discipline as a result of the conduct being investigated. The PSOPBR does not restrict the Department's ability to gather information from other sources, such as 911 tapes, or interviews with citizens. Item 1 and portions of Item 2 ascertainable from tapes and documents are outside the ambit of the PSOPBR. Similarly, the request to listen to dispatch recordings is unaffected.

The remainder of the inquiries appear to fall within the requirements of the PSOPBR. It is important to note the PSOPBR does not *prohibit* the Department from questioning the officers involved; it merely imposes procedural safeguards. All of the points of inquiry are legitimate questions. Although no specific complaints have been leveled against any particular officer (as far as I know), it seems evident that improprieties of some sort are being alleged, or are at least suspected. Therefore, it certainly seems plausible that the investigation could result in some officers being disciplined. Before any officer can be questioned about conduct that might lead to discipline, the Department must comply with the PSOPBR. This is the Department's responsibility, not the responsibility of the Vice-Mayor or the City Manager.

There is no legal reason why it would be inappropriate for the City Manager to be involved in the investigation as long as the PSOPBR is followed. For example, the City Manager could not "get around" the PSOPBR by sending OCM staff to interview the officers. (*Calif. Correctional Police Officers Assoc. v. State of California* (2000) 82 Cal.App.4th 294, which holds that a third party must comply with the POBR when conducting a joint investigation with the officers' employing agency).



Valerie J. Armento
City Attorney

C: City Council
City Manager
Director of Public Safety